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No. 99-269

IN THE
Supreme Court of the United States

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

SENECA NATION OF INDIANS AND
UNITED STATES OF AMERICA,

Respondents.

STATE OF NEW YORK,

Petitioner,

v.

SENECA NATION OF INDIANS, TONAWANDA BAND OF SENECA
INDIANS, AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of the Amici States in Support of New York

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INTERESTS OF THE *AMICI*

The *Amici* States have a substantial interest in the proper interpretation and application of the Eleventh Amendment. This case presents an Eleventh Amendment issue of substantial importance to the States—whether the mere intervention of the United States in an otherwise private suit circumvents a State's immunity from suit by the private parties in the case. Although the Court long has recognized that the United States may sue a State in federal court, including by filing an original action in this Court, the Court has yet to undertake a thorough examination of this question.

With this Court's recent state sovereign immunity decisions, *e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); and *Alden v. Maine*, 119 S. Ct. 2240 (1999), emphasizing the States' constitutionally grounded immunity from suits in either federal or state courts for alleged violations of federal law, private parties may seek ways to circumvent the States' immunity. The Court's recent opinion in *Alden v. Maine* itself acknowledges that the States do not have immunity from suits by the United States to enforce federal law. Of course, the States are not challenging the propriety of that doctrine, but it does not follow that private parties that have an interest in such litigation may participate in the case as adverse parties to the State with the right to conduct discovery, file motions, and participate in any trial of the matter. Such a result would undermine the purpose of the States' constitutional immunity—preventing States from being subjected to coercive judicial process without their consent at the instigation of private parties.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S ELEVENTH AMENDMENT HOLDING IN *ARIZONA v. CALIFORNIA*, 460 U.S. 605 (1983), IS PROBABLY WRONG AND SHOULD BE RECONSIDERED

The decision critical to the Second Circuit's ruling in this case is this Court's opinion in *Arizona v. California*, 460 U.S. 605 (1983), an original action involving a multi-State dispute over the water of the Colorado River. Relatively early in the litigation, the United States intervened in the case to represent the interests of various Indian tribes that held land along the river. Twenty-five years after the suit was commenced, several tribes themselves sought to intervene and participate in the litigation. In a single paragraph, the Court dismissed the States' Eleventh Amendment objection to the tribes' intervention. *See* 460 U.S. at 613-14. With all due respect, for the reasons set forth below, the Court's perfunctory analysis on this important constitutional question was probably wrong and merits reconsideration.

A. The Circumstances The Court Addressed In *Arizona v. California* Were Unique And The Court's Perfunctory Discussion Of The Eleventh Amendment Issue Is Unpersuasive

In *Arizona v. California*, 460 U.S. 605 (1983), this Court did not address, nor have any reason to consider, the type of Eleventh Amendment issues that may arise today when the United States seeks to intervene in a private lawsuit for the purpose of defeating a State's claim of immunity. As New York has explained, several factors distinguish the present case from the situation in *Arizona v. California*, and the *Amici* States will not repeat that discussion. Indeed, at a minimum, the unique circumstances in *Arizona v. California* alone provide a basis for strictly limiting the Court's Eleventh Amendment holding to the facts of that case.

Moreover, the Court's reasoning in rejecting the States' Eleventh Amendment argument in *Arizona v. California* is both perfunctory and unpersuasive. Beginning with a cryptic footnote, *see* 460 U.S. at 614 n. 4[1], the Court assumed "arguendo that a State may interpose its immunity to bar a suit brought against it by an Indian tribe," *id.* at 614, and then reasoned that any such immunity was lost when the United States intervened and asserted water rights on behalf of the tribes. *Id.* In the Court's view, the tribes did "not seek to bring new claims or issues against the states" and, thus, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* That was the sum total of the Court's Eleventh Amendment analysis.

B. The Court's Subsequent Decisions Confirm That The Eleventh Amendment Holding Of *Arizona v. California* Is Suspect

With all due respect, the Court's analysis in *Arizona v. California* does not withstand scrutiny in light of this Court's subsequent state sovereign immunity decisions. First, the Court no longer has to assume "arguendo" that a suit by a tribe against a State is subject to the restrictions imposed by the state's constitutionally grounded immunity. It is. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

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[1] Justice White in footnote four declared that "[t]here are suggestions in the papers that the states' sovereign immunity is in some respect distinct from the immunity afforded by the Eleventh Amendment." 460 U.S. at 614 n. 4. Nonetheless, he concluded that "[i]nsofar as the question of intervention posed here is concerned, we appreciate no such difference." *Id.* This Court's recent decision in *Alden v. Maine*, 119 S. Ct. 2240 (1999), of course, clarifies that the States' constitutionally grounded sovereign immunity is inherent in the Constitution's structure and that the Eleventh Amendment *confirms* rather than *establishes* that immunity.

(1996); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Second, the Court has expressly held that state sovereign immunity, like the personal immunities of individual government officials sued for money damages, is an *immunity from suit*. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The States' immunity is not simply an ultimate defense to liability, to be asserted at trial or at the summary judgment stage following potentially burdensome, tedious and costly discovery proceedings. To the contrary, when the immunity exists, it should terminate the suit at the earliest possible stage of the litigation, generally before the State is subjected to burdens of discovery and trial. This immunity should apply to each and every "suit" brought against nonconsenting states by private parties. The immunity should not be lost with respect to all "suits" merely because one of the plaintiffs (the United States) is not restricted by the State's immunity.

Thus, another error of *Arizona v. California* is the assumption that permitting private parties to participate in the proceedings, once the United States is already present, in no way adds to the costs and burdens of the litigation. The result does not depend upon whether the additional private parties actually assert their own claims against the State or, if so, whether those claims differ from the claims of the United States. Rather, the burden on the States is present irrespective of those considerations, and the intrusion on the States' constitutionally grounded immunity no less significant.

In fact, permitting private parties to intervene or remain in the litigation in a case like this creates a serious potential for drastically limiting the States' sovereign immunity. For, if the United States may lend its name to litigation but rely upon the private parties to conduct the proceedings and bear the costs of litigation, there is less incentive for the United States to make serious assessments about the importance of the litigation to

the federal government and the costs to the federal sovereign of participating. In this respect, this case raises issues similar to those arising in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (cert. granted June 24, 1999), the *qui tam* case brought under the False Claims Act in which one question is whether a private citizen technically acting in the name of the United States can overcome a state's Eleventh Amendment immunity.

Finally, as New York explains in its Petition for a Writ of *Certiorari*, the Court's decision in *Arizona v. California* that the tribes' presence would not enlarge the claims or issues contravenes later decisions expressly holding that there is no "pendent party" jurisdiction in the Eleventh Amendment context. Indeed, "[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 251 (1985). Thus, "[a]lthough the Eleventh Amendment does not bar the United States from suing a State in federal court, the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes." *Pennhurst State School & Hospital v. Haldeman*, 465 U.S. 89, 103 n. 12 (1984).

C. The Court Should Reconsider *Arizona v. California* And Either Overrule Its Eleventh Amendment Holding Or Limit That Holding To That Case's Unique Facts

This Court's subsequent decisions largely undermine the rationale of *Arizona v. California*. Moreover, that case presented unique circumstances, including the fact that it was an *original* action. In light of these considerations, the Court should grant New York's Petition for a Writ of *Certiorari* and reconsider the Eleventh Amendment holding of *Arizona v. California*. With all due respect, the *Amici* States assert that the Court's holding was wrong and should be overruled. In the

alternative, and at a minimum, *Arizona v. California* should be strictly limited to its facts, applying only in original actions.

D. This Important, Unsettled Eleventh Amendment Issue Has Implications Far Beyond Suits Brought Against States By Indian Tribes

The phenomenon of intervention by the United States in order to defeat a State's claim of immunity is not limited to cases involving Indian tribes. For instance, private plaintiffs recently filed suit in federal court against the State of Kansas, challenging the legality of the Kansas school finance system under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Robinson v. Kansas*, No. 99-1193-JTM (D. Kan. filed May 21, 1999). The State of Kansas asserted its Eleventh Amendment immunity in its motion to dismiss the case. Before the court resolved the issue, the United States Department of Justice moved to intervene. Significantly, the United States did *not* take a position on the *merits* of the plaintiffs' claims but, instead, primarily addressed the State's Eleventh Amendment immunity. While the very intervention of the United States will defeat the State's immunity from any claims brought by the United States itself, the important, unsettled question is whether the private parties may remain in the case and participate in the proceedings, assuming the State would otherwise have immunity from their claims.

If the States' immunity to private suits will be overcome whenever the United States lends its name to otherwise private litigation, the States can expect such a tactic to be used with some frequency. On the other hand, if a federal court's jurisdiction over the private party claims must be tested as to each "suit" brought by each party, the United States itself would be forced to actually take over and conduct the litigation in which it intervenes in order to defeat the States' immunity with respect to otherwise private claims, with no participation by the private parties. In those circumstances, intervention

would become more costly and time consuming, requiring the United States to carefully assess such intervention decisions. The proper resolution of this issue is of critical importance to the States, making this case worthy of the Court's attention.

II. ALTERNATIVELY, BECAUSE THE VERMONT *QUI TAM* CASE CURRENTLY ON THE COURT'S PLENARY DOCKET, *VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES*, No. 98-1828, RAISES SIMILAR ISSUES REGARDING THE LEGAL EFFECT OF THE UNITED STATES' INVOLVEMENT, OR LACK THEREOF, IN A SUIT AGAINST A STATE, THE COURT SHOULD HOLD NEW YORK'S PETITION PENDING RESOLUTION OF THE VERMONT CASE

As an alternative to an immediate grant of this case, and at a minimum, the Court should hold New York's petition for disposition pending the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, which may be argued as early as December 1999. In that case, a private citizen brought a federal *qui tam* suit[2] against a state agency under the federal False Claims Act ("FCA")[3] in

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[2] A *qui tam* suit is one that is, in theory, on behalf of the sovereign, but which private citizens are authorized to bring in the government's name. In the False Claims Act context, the statute provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). The sovereign has the authority to exercise significant control over the litigation, if it so desires, and will receive the lion's share of any recovery, although the *qui tam* plaintiff also is entitled to a share of any damages. *See, e.g.*, 31 U.S.C. § 3730(d).

[3] *See* 31 U.S.C. § 3729(a) (imposing civil liability on "[a]ny person who makes a false monetary claim to the United States Government"). In this

federal court. The state agency defendant moved to dismiss the suit on, *inter alia*, the ground that the suit is barred by the Eleventh Amendment. The Second Circuit concluded that, because the plaintiff in a *qui tam* suit in theory steps into the shoes of the United States (which can sue States in federal court without triggering the Eleventh Amendment's protections) and sues on its behalf, the Eleventh Amendment is not a bar to the suit.[4]

There is a strong parallel between the Eleventh Amendment issues that case raises and the Eleventh Amendment issues New York raises in its Petition for a Writ of *Certiorari* here. Both cases involve the effect of the United States' presence or name in litigation initiated by private parties and that would otherwise be barred by the States' constitutional immunity, absent the involvement of the United States. If in the Vermont case the Court concludes that *qui tam* suits in which the United States declines to play the controlling role are barred by the Eleventh Amendment, then the Second Circuit's decision in the New York case will be even less supportable, and this Court's decision in *Arizona v. California* will be even more anomalous.

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case, the allegation is that the defendant state agency, which received federal grants administered by the Environmental Protection Agency for purposes of implementing provisions of the Clean Water Act and the Safe Drinking Water Act, misused those funds to pay salaries of state employees for work not actually involving the federal water statutes. *See United States v. Vermont Agency of Natural Resources*, 162 F.3d 195, 198 (2d Cir. 1998) (describing allegations of complaint), *cert. granted, Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (June 24, 1999).

[4] 162 F.3d at 201-03. The Second Circuit also rejected the state agency's argument that a state is not a "person" within the meaning of the False Claims Act. That issue, too, is before the Court and could provide a non-constitutional basis for ruling in the State's favor in the case.

At a minimum, the Court should hold New York's petition for disposition following the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in New York's Petition for a Writ of *Certiorari*, the Petition should be granted immediately or, in the alternative, held for disposition pending the Court's decision this Term in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

Respectfully submitted,

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